Court of Appeals of New York.

JAMES MOORE *vs.* JOHN J. V. WESTERVELT, SHERIFF OF THE CITY AND COUNTY OF NEW YORK.

When a sheriff takes goods in execution or by attachment, or in an action where the plaintiff seeks to recover possession of them, he becomes a bailee for the benefit of all parties interested.

In such case his duties are analogous to those of a bailee where the bailment is beneficial to both parties, as in case of hiring, and he is therefore responsible only for such loss or damage to the goods as results from his want of *ordinary care*, which is such care as a man of common prudence takes of his own affairs.

This action was brought in the Superior Court of New York City, to recover damages for the alleged neglect of the defendant, as sheriff of that city, to keep in a secure place and deliver to the plaintiff, a cargo of anthracite coal, which was taken possession of on board the schooner Calcutta at a wharf on East river in said city, by the defendant as such sheriff, by virtue of papers delivered to him in an action brought to recover the possession of such coal by the plaintiff in this action against one Lewis Hoffman, who was the master of the said schooner. The schooner was fastened to the wharf. The sheriff did not remove the coal from the schooner, but left a person on board in charge of the coal with the assent of the master. Within three days after the sheriff thus took possession of the coal the schooner and coal were sunk in East river during a gale of wind; which sinking damaged the coal that was not lost, and the plaintiff was put to considerable expense in raising that portion of the coal not lost.

Hoffman did not take any steps to have the coal re-delivered to him, and the plaintiff became entitled to the same at the expiration of three days from the time it was seized by the sheriff, according to sections 209, &c. of the Code. The plaintiff recovered a judgment in his action against Hoffman entitling him to the possession of the coal; and he subsequently brought this action against the defendant as sheriff, &c. Evidence was given by both parties as to whether the schooner was properly fastened or duly taken care

of, and as to whether the schooner or coal was sunk by reason of any negligence on the part of the defendant or the persons having charge of the same after the defendant seized the coal and claimed to have possession of it.

The action has been tried several times (see decisions in the same, 1 Bosworth 357, 2 Duer 59). On the last trial Charles H. Hallenback, a witness for the defendant, testified that he had been in freighting establishments seven years where they had vessels running from Hudson to New York; that he had been a clerk on board of a steamboat some three years; that he had charge of mooring the vessel when the captain was off, though he did not leave that altogether to his charge, but to his and the pilots; and that he thought he (the witness) understood it. He described the situation of the schooner, and testified that it was fastened at the bow and stern with hawsers, and that he had charge of the coal by direction of the defendant. He also stated the hawsers were a large rope and the kind usually used for fastening vessels. The defendant's counsel put this question to this witness: "Please state what was the condition of the fastenings of this vessel as to safety?" It was objected to on the ground that it was not a question of science, and that the jury were just as competent to judge of it as the witness. The objection was overruled, and the plaintiff's counsel excepted. The witness answered, "I should judge that she was safely moored." By the Court: "You mean to say that the fastenings were proper fastenings for a vessel in that condition." Answer: "Yes, sir; I have seen vessels time and time moored in the same way." By the Court: "In ordinary times?" Answer: "Yes, sir." Question: "With reference to a storm, how was it?" Answer: "I could not say; it would depend upon how severe the storm would be; sometimes our ships have broken them, and at other times with a storm not quite so heavy they would not part them."

Evidence was given that the schooner was leaky; as to the severity of the gale; and as to the manner the schooner was taken care of; and as to the circumstances under which she was sunk.

The Judge charged the jury that the great question in the case

was whether the sheriff, after having taken the coal into his possession, was guilty of such negligence in regard to its care and preservation, as occasioned its injury and consequent loss to the plaintiff. That it was the duty of the sheriff to take such steps to insure the safety of the coal, as a careful, prudent man of good sense and judgment, well acquainted with the condition of the vessel and her location with regard to exposure to storms, and having all the power of the sheriff in the matter, might reasonably have been expected to take, had the coal belonged to himself.

That if the jury came to the conclusion the sheriff did not take that degree of care for the preservation of the coal he had thus indicated, and that the injury was occasioned by the negligence of the defendant or his officers, the plaintiff would be entitled to a verdict. The plaintiff's counsel interposed: "I ask the Court to charge that the sheriff is responsible for the negligence of the master and crew after he took possession." The Judge then said, "The sheriff was bound to do this. If such an owner as I have indicated would have taken the coal from the vessel as it lay at the wharf in the first instance, the sheriff was bound to do it. He was bound to know the condition of the vessel, whether it leaked, whether it was seaworthy for the place in which it lay, how deeply laden, everything in regard to it, and he was bound to put on board the vessel if necessary, such men as would pump her out, and keep her in a condition to insure the safety of the coal." The defendant's counsel interposed: "I ask the Court to charge the jury, that if a prudent man in a case of his own vessel, would not have removed her in the storm, the sheriff would not be bound to." By the Court: "Certainly he would not." To which the counsel for the plaintiff excepted. The following requests of the plaintiff's counsel to charge the jury were presented to the Court before the charge was made, viz: "1st. That the sheriff was bound to take more than ordinary care of this property, and if for the want of more than ordinary care the property was lost, he is responsible. 2d. That if the sinking happened from the want of due caution either by the sheriff, deputy sheriff, captain, master, or hands of the vessel, then the sheriff is responsible." The plaintiff's counsel

separately excepted to the refusal of the Court to charge the jury as firstly, secondly, and lastly requested to charge. The jury rendered a verdict in favor of the defendant. Plaintiff's counsel made a motion for a new trial on the minutes of the Court, which was denied, and judgment was entered on the verdict in favor of the defendant for costs. The general term of the Superior Court affirmed the judgment, and the plaintiff appealed to this Court.

The decision of this Court when the cause was here the first time, is reported in 21 N. Y. Reports, page 103.

H. H. Burlock, for plaintiff.

A. J. Vanderpoel, for defendant.

June 1863. The opinion of the Court was delivered by

BALCOM, J.—The witness, Hallenbeck, had had some experience in mooring vessels, and said he thought he understood it; he stated how the schooner, having the coal in question on board, was moored; and I am of the opinion he was competent to answer the question, "What was the condition of the fastenings of this schooner as to safety?" The business of mooring vessels requires skill to do it properly; but Hallenbeck possessed enough to render his opinion, as to whether the schooner was safely moored, competent evidence, though it certainly was not entitled to much weight, and probably did not have much influence with the jury.

When the cause was in this Court the first time, Judge SELDEN intimated an opinion that the sheriff was responsible for more than ordinary diligence in taking care of the coal; but the Court did not so decide.

According to section 209 of the Code, it was the duty of the sheriff to take the coal, and retain it in his custody; and section 215 required him to keep it in a secure place, and deliver it to the party entitled thereto, who was the plaintiff, after the expiration of three days, as Hoffman did not take any steps for its re-delivery to him pursuant to section 211. But the defendant, as sheriff, did not, under the circumstances, become an insurer of the coal: 21

N. Y. Reports 103. In *Jenner* vs. *Joliffe*, 6 Johns. 9, THOMPSON, J., in delivering the opinion of the Court, said: "If the loss of the timber happened while it was held under the attachment, and without the negligence of the officer, the defendant ought not to be responsible for it." In *Browning* vs. *Hanford*, 5 Hill 588, COWEN, J., was of the opinion Justice STORY was right in putting the general liability of officers having the charge of property on the same footing as that of bailees for hire. See Story on Bailments § 130, 3d ed. Edwards says: "A sheriff levying upon goods, must use due diligence to keep them safely to satisfy the execution. But he is not an insurer, and is not, like a common carrier, answerable for a loss of the goods by fire. His capacity as an officer, is not considered as fixing a more rigorous measure of liability upon him than if he were a private person." It seems that the views of this learned author, in regard to the liability of sheriffs having the charge of property, coincide with those of Justice STORY. See Edwards on Bailments 59.

When a sheriff takes goods in execution, or by attachment, or in an action where the plaintiff seeks to recover possession of them, he becomes a bailee for the benefit of all parties interested—certainly for the benefit of the party who sets him in motion; and "where the bailment is beneficial to both parties, as in case of pledging or letting to hire, the bailee must answer for ordinary neglect:" 1 Cowen Tr., 2d ed., 56. A bailee for hire, or where the bailment is beneficial to both parties, must exercise ordinary diligence in taking care of the property he has in trust; which is the care that every person of common prudence, and capable of governing a family, takes of his own concerns. The converse of this is the omission of that care which such a person takes of his own concerns, and is termed ordinary neglect. Edwards on Bailments 44.

I am unable to see why a sheriff should be required to exercise any greater diligence in taking care of property in his custody, than a bailee for hire: and I am of the opinion the degree of diligence each is bound to exercise is the same.

If I am right in this conclusion, the charge was as favorable to

the plaintiff as it should have been. The charge was, that it was the duty of the sheriff to take such steps to insure the safety of the coal, as a careful, prudent man of good sense and judgment, well acquainted with the condition of the schooner, and her location with regard to exposure to storms, and having the power of the sheriff in the matter, might reasonably have been expected to take, had the coal belonged to himself.

The subsequent remarks of the Judge, that if a prudent man in a case of his own vessel, would not have removed her in the storm, the sheriff was not bound to, did not make the charge exceptionable. If the sheriff did as the Judge charged it was his duty to do, he certainly exercised ordinary care in taking care of the coal: and his omission to remove the schooner, if a prudent man would not have done so in the storm, provided she had been his own, was not ordinary neglect. The jury had previously been instructed that the sheriff was bound to know the condition of the schooner, whether it leaked, whether it was seaworthy for the place in which it lay, how deeply laden, everything in regard to it; and that he was bound to put on board of the schooner, if necessary, such men as would pump her out, and keep her in a condition to insure the safety of the coal. This is all a careful, prudent man could have known, or would have done, if he had owned the schooner. And as I understand the charge, it made the sheriff responsible for the alleged negligence of the master and crew of the schooner after he took possession, so far at least as they had anything to do with the schooner or coal; and in this view of the charge, the refusal of the Judge to repeat or state to the jury the second request of the plaintiff's counsel, was not error: for he had already charged the same proposition in legal effect.

The first request of the plaintiff's counsel to charge the jury was rightfully refused, because it was a proposition that the sheriff was bound to take more than ordinary care of the coal, and that if for the want of more than ordinary care the same was lost, he was responsible.

We have nothing to do with the question whether the verdict of the jury was against evidence. The decision of the Court below that it was not, is conclusive upon that point.

These views lead to the conclusion that the judgment of the Superior Court should be affirmed.

DAVIES, J., read an opinion for affirming the judgment.

All the Judges were in favor of affirming the judgment of the Superior Court with costs.

Decision accordingly.

LEGAL MISCELLANY.

The authority of counsel in the management, and more especially in the settlement of a cause, has been the subject of much doubt in England since the famous case of *Swinfen* vs. *Swinfen*, 4 L. T. Rep. N. S. 194, and the more general opinion has been, that such authority does not extend to the *settlement* of a case without express authority from the client. The case of *Choun* vs. *Parrott*, however, recently decided by the Court of Common Pleas, (8 Law T. Rep. N. S. 391), has decided in favor of the counsel's power to settle an action, provided he acts reasonably, skilfully, and *bonâ fide*, and unless there is an express command of the client to the contrary. This is in accordance with common sense, and has long been regarded as the settled law in the United States.

The mistakes of foreigners in speaking of our institutions, are always amusing, though not often as harmless as that of Baron BRAMWELL, very recently in *Waller* vs. *S. E. Railway Co.*, 8 L. T. Rep. N. S. 328, where he refers to the late venerable Ch. J. of Massachusetts as *Lord* Chief Justice SHAW. Of course it was a slip of the tongue with the learned Baron, or perhaps the reporter alone is responsible for it, but the language as well as the learning and feeling of the legal profession in England and this country are so much in common, that we almost forget that the former are foreigners to us, until reminded of the fact by some little incident like the above.

In the last number of the London Law Magazine and Law Review, we have an article on the case of the Alabama, in which the